APPELLATE CIVIL.

1908
April 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NARAIN PRASAD AND OTHERS (PLAINTIFFS) *v.* MUNNA LAL AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Co-sharer—Owner of resumed muafi land.

The pre-emptive clause of a wajib-ul-arz contained the following provision :—*Minjumla malikon-ke agar koi hissadar apni haqqiat bai karne chahe to awwal dusre hissadar sharik haqqiat-ki hath bai karega.*"

Held that the owner of resumed muafi land (which had been resumed before this wajib-ul-arz was framed) in the same khewat as the land sold was entitled to pre-emption as against a vendee who was merely a co-sharer in a different khewat. *Lalta Prasad* v. *Lalta Prasad* (1) referred to.

THIS was a suit for pre-emption. The property sold was a one-third share of a resumed *muafi* holding. The vendee was the holder of *muafi* land in a different khewat of the mahal in which the land sold was situate. The pre-emptors were co-owners with the vendor in the land sold. The claim was based upon the provisions of the wajib-ul-arz, which are set forth in the head-note and in the judgment of the Court. The question at issue was whether the plaintiffs pre-emptors were entitled to pre-empt as "hissadars" by reason of their being owners of resumed muafi lands. The Court of first instance (Munsif of Muttra) decreed the claim, and this decree was on appeal confirmed by the District Judge of Agra. The defendant vendee appealed to the High Court, where the appeal coming before a single Judge was allowed—see Weekly Notes, 1907, p. 173, *Munna Lal* v. *Narain Prasad*. Against this decision the plaintiffs appealed under section 10 of the Letters Patent.

Munshi *Gulzari Lal*, for the appellants.

Pandit *M. L. Sandal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—We have given most careful consideration to the arguments addressed to us by the learned pleaders for the respective parties and have perused the judgment of the learned District Judge and also the judgment of the learned Judge of this Court. It is found that the plaintiffs are

* Appeal No. 46 of 1907 under section 10 of the Letters Patent, from a judgment of Griffin, J., dated the 20th of May 1907.

(1) Weekly Notes, 1881, p. 165.

1908

NARAIN PRASAD v. MUNNA LAL

co-sharers in resumed muafi land, a portion of which is the subject matter of the sale sought to be pre-empted. This resumed muafi is included in khewat No. 3, in which the plaintiffs are co-sharers, whilst the defendant vendee Munna Lal is not a co-sharer in khewat No. 3, but is a co-sharer in khewat No. 5, with which the land in dispute is not connected, except in the fact that both khewats are recorded as appertaining to the same mahal. The provision of the wajib-ul-arz is that if from among the *malikan* any co-sharer wishes to sell his *haqqiat*, he will first sell the same to a co-sharer in the property (*shariq haqqiat*), and in case the latter refuses to purchase then to anyone he likes. The muafi in question was resumed before the preparation of the wajib-ul-arz in which this provision is found, and it seems to us that the word *malikan* must be taken to include the proprietors of the resumed muafi and that co-sharers of the land in the khewat in which the land sold is situate have a preferential right to pre-empt over co-sharers in land in a different khewat of the resumed muafi. The learned District Judge, who accepted the view entertained by his predecessor in office, appears to us to have correctly appreciated the position of the parties in regard to the property. The learned Judge of this Court has referred to a number of cases, but we find that these cases have little or no bearing upon the case before us. In fact he states in his judgment that they are distinguishable, although he attaches some weight to them. A case which does appear to throw light upon the question is one which was not cited to him, namely, the case of *Lalta Prasad* v. *Lalta Prasad* (1). In that case a somewhat similar question to the one before us was considered. A zamindari village contained a plot of land which at one time had been held on a *muafi* tenure, but had been resumed and had become zamindari. This plot was separately assessed to revenue, but had no separate wajib-ul-arz. A co-sharer in it sold his share to the defendant, a stranger, upon which the plaintiff, a co-sharer in the old zamindari, but not a co-sharer in the resumed muafi, brought a suit to enforce a right of pre-emption, and it was held by Stuart, C.J., and Tyrrell, J., that the lower courts were wrong in limiting the right of pre-emption to the old

(1) Weekly Notes, 1881, p. 165.

1908

NARAIN PRASAD v. MUNNA LAL.

zamindari lands and in not extending it to the part of the village, which had formerly been muafi in its tenure. So here, we think the learned Judge of this Court was wrong in not extending to the owners of the resumed muafi the rights which were given to *malikan* generally in the wajib-ul-arz prepared after the resumption of the muafi land and the inclusion of this land in the mahal. We therefore allow the appeal. We set aside the decree of the learned Judge of this Court, and we restore the decree of the lower appellate Court with costs in all Courts.

Appeal decreed.

REVISIONAL CIVIL.

1908
April 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

JWALA (APPLICANT) *v.* GANGA PRASAD (OPPOSITE PARTY).*

Act No. I of 1877 *(Specific Relief Act), section* 9—*Criminal Procedure Code, section* 145—*Possessory suit*—*Effect of order of a Criminal Court*—*Revision.*

Held that the existence of an order passed under section 145 of the Code of Criminal Procedure is no bar to the institution of a suit under section 9 of the Specific Relief Act, 1877, for recovery of possession of the same land.

Held also that when a suit under section 9 of the Specific Relief Act is decreed the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. *Sheo Prasad Singh* v. *Kastura Kuar* (1) referred to.

THE plaintiff in this case sued under the provisions of section 9 of the Specific Relief Act, 1877, to recover possession of a house of which he alleged that he had been forcibly dispossessed by the defendant on the 10th of October 1905. The Court of first instance (Subordinate Judge of Cawnpore) found that the plaintiff was in possession of the house in question up to the 10th of October, 1905, and that upon that date forcible possession had been taken by the defendant, and accordingly gave the plaintiff a decree. It appeared, however, that a Criminal Court had, in proceedings taken under section 145 of the Code of Criminal Procedure, found that at the date of the institution of such

*Civil Revision No. 44 of 1907 from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 28th of March 1907.

(1) (1887) I. L. R., 10 All., 119.